Supreme Court, U.S.
FILED

942102 JUN 20 1995

OFFICE OF THE CLERK

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

U.A. LOCAL NO. 343 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO; U.A. LOCAL NOS. 159, 342, 343 and 444 COMBINED PENSION TRUST FUND; U.A. LOCAL NOS. 159, 342, 343 and 444 COMBINED HEALTH & WELFARE TRUST FUND; and U.A. LOCAL NO. 343 JOURNEYMAN AND APPRENTICE TRAINING TRUST FUND,

Petitioners,

v.

NOR-CAL PLUMBING, INC.; NORTH BAY PLUMBING, INC.; ELMAR LEE PETTIT, a.k.a. ELMER LEE PETTIT; and AUDREY JEAN PETTIT,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

JOHN J. DAVIS, JR.
Counsel of Record
MCCARTHY, JOHNSON & MILLER
595 Market Street, Suite 2200
San Francisco, CA 94105
(415) 882-2992
Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

60

QUESTION PRESENTED

Under federal labor law, may a finding of an alter ego violation be based upon objective evidence without requiring additional proof that the employer's subjective intent is to avoid its obligations under its collective bargaining agreement?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
INTRODUCTION	4
STATEMENT OF THE CASE	5
A. Nature of the Case	5
B. Summary of the Facts	8
C. Proceedings Below	9
REASONS FOR GRANTING THE PETITION	12
CONCLUSION	15
APPENDIX A	1a
APPENDIX B	19a
APPENDIX C	30a

TABLE OF AUTHORITIES

Cases	Page
A. Dariano & Sons, Inc. v. District Council of Painters No. 33, 869 F.2d 514 (9th Cir. 1989)	6, 7, 10
Alkire v. N.L.R.B., 716 F.2d 1014 (4th Cir. 1983)	12
Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983)	6, 7, 12
Fugazy Continental Corp. v. N.L.R.B., 725 F.2d 1416 (D.C. Cir. 1984)	12
Goodman Piping Products v. N.L.R.B., 741 F.2d 10 (2d Cir. 1984)	12
Haley & Haley, Inc. v. N.L.R.B., 880 F.2d 1147 (9th Cir. 1989)	7, 10, 12, 14
Iowa Express Distribution, Inc. v. N.L.R.B., 739 F.2d 1305 (8th Cir. 1984), *cert. denied*, 469 U.S. 1088 (1984)	12
Johnstown Corp. and/or Stardyne, Inc., 313 N.L.R.B. 170 (1993)	12
N.L.R.B. v. Allcoast Transfer, Inc., 780 F.2d 576 (6th Cir. 1986)	12, 13, 15
N.L.R.B. v. Burns International Security Services, Inc., 406 U.S. 272 (1972)	13
N.L.R.B. v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990)	16
N.L.R.B. v. Don Burgess Construction Corporation, 596 F.2d 378 (9th Cir. 1979), *cert. denied*, 444 U.S. 940 (1979)	6
N.L.R.B. v. Hospital San Rafael, 42 F.3d 45 (1st Cir. 1994)	4, 5, 12, 15
N.L.R.B. v. O'Neill, 965 F.2d 1522 (9th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 2995	10, 12, 14
N.L.R.B. v. Tricor Products, Inc., 636 F.2d 266 (10th Cir. 1980)	12
N.L.R.B. v. Welcome-American Fertilizer Co., 443 F.2d 19 (9th Cir. 1971)	6
Stardyne, Inc. v. N.L.R.B., 41 F.3d 141 (3d Cir. 1994)	4, 12, 13, 15
Trustees of Funds of IBEW Local 701 v. Favia Electric Co., 995 F.2d 785 (7th Cir. 1993)	12

TABLE OF AUTHORITIES—Continued

Statutes	Page
28 U.S.C. § 1254(1)	2
29 U.S.C. § 151	13
Section 8(a)(1), National Labor Relations Act [29 U.S.C. § 158(a)(1)]	6
Section 8(a)(5), National Labor Relations Act [29 U.S.C. §158(a)(5)]	6
Section 301(a), Labor-Management Relations Act [29 U.S.C. § 185(a)]	2, 5, 6, 7, 9
Section 502, Employee Retirement Income Security Act [29 U.S.C. § 1132]	7, 8
Section 502(e)(1), Employee Retirement Income Security Act [29 U.S.C. § 1132(e)(1)]	3
Section 502(g)(2), Employee Retirement Income Security Act [29 U.S.C. § 1132(g)(2)]	3, 8
Section 515, Employee Retirement Income Security Act of 1974 [29 U.S.C. § 1145]	2, 6, 7, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. ———

U.A. LOCAL NO. 343 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO; U.A. LOCAL NOS. 159, 342, 343 and 444 COMBINED PENSION TRUST FUND; U.A. LOCAL NOS. 159, 342, 343 and 444 COMBINED HEALTH & WELFARE TRUST FUND; and U.A. LOCAL NO. 343 JOURNEYMAN AND APPRENTICE TRAINING TRUST FUND,

Petitioners,

v.

NOR-CAL PLUMBING, INC.; NORTH BAY PLUMBING, INC.; ELMAR LEE PETTIT, a.k.a. ELMER LEE PETTIT; and AUDREY JEAN PETTIT,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

U.A. Local Union No. 343 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO ("U.A. Local 343"); U.A. Local Nos. 159, 342, 343 and 444 Combined Pension Trust Fund; U.A. Local Nos. 159, 342, 343 and 444 Combined Health &

Welfare Trust Fund; and U.A. Local No. 343 Journeyman and Apprentice Training Trust Fund ("Trust Funds") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this lawsuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 48 F.3d 1465. The opinion of the district court (App. B, *infra*) is reported at 797 F. Supp. 767.

JURISDICTION

The court of appeals denied a petition for rehearing herein on February 23, 1995 (App. C, *infra*) and entered its order and amended opinion on February 28, 1995. On May 11, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including June 23, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor-Management Relations Act ("LMRA"), as amended, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 515 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1145 provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1) provides, in relevant part:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary.

Section 502(g)(2) of ERISA, 29 U.S.C. § 1132(g)(2) provides:

> In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—
>
> (A) the unpaid contributions,
>
> (B) interest on the unpaid contributions,
>
> (C) an amount equal to the greater of—
>
> (i) interest on the unpaid contributions, or
>
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
>
> (E) such other legal or equitable relief as the court deems appropriate.
>
> For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate

provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

INTRODUCTION

Within the space of three months, courts of appeals from three circuits have issued conflicting decisions on the issue presented here. The issue involves the elements of proof required under the labor law alter ego doctrine, one of several rules developed by the National Labor Relations Board for determining whether purportedly separate entities are so closely related that they should be treated as a single enterprise.

In *Stardyne, Inc. v. N.L.R.B.*, 41 F.3d 141 (3d Cir. 1994) and *N.L.R.B. v. Hospital San Rafael*, 42 F.3d 45 (1st Cir. 1994), the First and Third Circuits enforced decisions and orders holding that illegal motive need not be shown in order to establish alter ego status under federal labor law. In the instant case, a panel of the Ninth Circuit, in conflict with Ninth Circuit precedent, held that a showing of such intent is required to establish alter ego status. As the Third Circuit noted in *Stardyne, supra*, 41 F.3d at 146-147, n.4, the circuits' conflicts on this issue long predate these three cases.

Stardyne, supra, was remanded to the National Labor Relations Board for clarification of the relationship between its single employer and alter ego doctrines. It is presently pending there. *Hospital San Rafael, supra*, is the subject of a certiorari petition presently before this Court in No. 94-1802.

Petitioners submit that the Board should be allowed to clarify the single employer and alter ego doctrines, and the relationship between them, in accordance with its statutory mandate. See *Stardyne, supra*, 41 F.3d at 147-148. Accordingly, petitioners submit that the petition in No. 94-1802 should be denied as being premature in the process of policy development prescribed by Congress. However, if the Court disagrees with that position and grants the *Hospital San Rafael* petition, then this case

also is worthy of review because it raises exactly the same legal issue as the petition in *Hospital San Rafael.*

In the instant case, the Ninth Circuit vacated a summary judgment and remanded the action for trial, principally on the issue of illegal intent. It would make little sense for that trial to go forward while the question of the intent requirement's propriety were before this Court for plenary review. This Court's review could lead to a change in the law, which could necessitate a second appeal and a retrial in the instant case. To avoid such a result, petitioners submit that if the petition in No. 94-1802 is granted, then the instant petition should be granted as well, or, at a minimum, should be held pending the Court's decision therein.

STATEMENT OF THE CASE

A. Nature of the Case

In labor law parlance, this is a "double-breasted employer" case of the "alter ego" variety. The term "double-breasted" describes a situation in which a union-signatory business, or its owners, also have an interest in another, similar, non-union business. If the two businesses are entirely separate, if no common owner exercises control over more than one of the businesses, and if the two businesses deal with each other purely at arm's length, then the double-breasted relationship is lawful and may remain intact.

But where the separateness of the businesses is not scrupulously maintained, either they may be found to be a "single employer" or the non-union business may be found to be the "alter ego" of the union business. In either event, they will be held by a court to have violated the union recognition and work coverage clauses of the labor agreement, *inter alia*, or by the NLRB to have violated their duty to bargain with the union. The same legal standards are applied by the courts and the Board, even though the former adjudicate under Section 301 of the

LMRA and Section 515 of ERISA, while the latter decides unfair labor practices under Sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5) and (1). *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 509-513 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983).

The standard for determining "single employer" status is well established. As the Ninth Circuit explained below (App. A, *infra*, 4a-7a) and in *N.L.R.B. v. Don Burgess Construction Corporation*, 596 F.2d 378, 384 (9th Cir. 1979), *cert. denied*, 444 U.S. 940 (1979):

> It is settled that the Board may treat two or more distinct business entities as a "single employer" for purposes of the Act. In such cases, the criteria to which the Board looks in order to determine single employer status are (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. [Citations omitted.] The Board has stressed the first three of these factors, as well as the presence of control of labor relations. [Citations omitted.] However, no one of the factors is controlling, *N.L.R.B. v. Welcome-American Fertilizer Co.*, 443 F.2d 19, 21 (9th Cir. 1971), nor need all criteria be present. Single employer status ultimately depends on "all the circumstances of the case" and is characterized as an absence of an "arm's length relationship found among unintegrated companies." [Citations omitted.]

Where, as here, the non-union business is alleged to be the "alter ego" of the union signatory, the same criteria are applied initially. App. A, *infra*, 5a-9a, *A. Dariano & Sons, Inc. v. District Council of Painters No. 33*, 869 F.2d 514, 518-519 (9th Cir. 1989). After making the initial single employer finding, the NLRB or the court goes on to determine whether the non-union business is, in reality, either the disguised continuance of a former union signatory or an attempt to avoid the union signatory's collective bargaining obligations through a sham

transaction or a technical change in operations. *Haley & Haley, Inc. v. N.L.R.B.*, 880 F.2d 1147, 1149-1150 (9th Cir. 1989) and cases cited,[1] *A. Dariano & Sons, supra*, 869 F.2d at 518. The Ninth Circuit treats this standard as equivalent to the NLRB's formulation of the alter ego test: "substantially identical management, business purpose, operation, equipment, customers, supervision and ownership." *Haley & Haley, supra*, 880 F.2d at 1150.

The most important difference between the two doctrines lies in their results. When two businesses are found to be a single employer, a question remains whether their employees together constitute an appropriate bargaining unit, and thus whether the double-breasted employer can be held liable under the labor agreement. App. A, *infra*, 4a-5a. In the Ninth Circuit, such a unit determination must be left to the NLRB. *Ibid.*, and cases cited there. *Contra, Pratt-Farnsworth, supra*, 690 F.2d at 513-522.

In an alter ego case like this one, however, the court proceeds directly to enforcement of the collective bargaining agreement. App. A, *infra*, 5a, *A. Dariano & Sons, supra*, 869 F.2d at p. 518. This is because " 'in alter ego cases, the issue is whether the work is effectively still in the [bargaining] unit because the allegedly new employer is the same as the former employer.' " *Haley & Haley, supra*, 880 F.2d at 1149.

The compensatory damages recoverable by trust funds in alter ego cases are the fringe benefit contributions they would have received had the employer applied the labor agreement to its entire business, not just the "union side." Such claims are brought under Section 301 of the LMRA, 29 U.S.C. § 185, and Sections 502 and 515 of ERISA,

---

[1]As the court of appeals observed (App. A, *infra*, 10a), the alter ego doctrine is not limited to successor situations. It applies equally to parallel, concurrent operations. In *Haley & Haley, supra*, the two companies were operated concurrently for eighteen months as the business was transferred to the non-union company. The same was done here over a somewhat longer period.

29 U.S.C. §§ 1132 and 1145. These damages are augmented with liquidated damages, interest and attorneys' fees pursuant to the labor agreement and Section 502(g)(2) of ERISA, 29 U.S.C. § 1132(g)(2).

B. Summary of the Facts

This case arises from respondents' transfer of the business of Nor-Cal Plumbing, Inc., a long-time union-signatory plumbing contractor owned and managed by Elmar Lee Pettit, to North Bay Plumbing, Inc., a non-union company purportedly owned by his wife, Audrey Jean Pettit. In fact, North Bay always has been owned, controlled and managed by Mr. Pettit. North Bay has continued Nor-Cal's business, but has not honored its labor agreement with U.A. Local 343, a plumbers and pipe fitters union, as to the work it covers.

The clear and unimpeached evidence is that in late 1980, Mr. Pettit established North Bay behind the disguise of Mrs. Pettit's purported ownership. North Bay's purported general manager was John Adams, a Nor-Cal plumbing foreman whom Mr. Pettit recruited for North Bay. From North Bay's earliest days Mr. Pettit hired, supervised, promoted and fired its employees, directed its operations, dealt with its customers, and commingled the two companies' purchasing and use of assets. And while North Bay never issued stock so as to show its ownership, on two occasions in 1983 Mr. Pettit testified that he owned and managed North Bay. He also made numerous sworn statements to the California Contractors State License Board that he owned and managed North Bay.

Nor-Cal and North Bay were integrated parts of one enterprise. Between North Bay's inception in late 1980 and Nor-Cal's demise in early 1987, Mr. Pettit gradually transferred Nor-Cal's major customers and business to North Bay. In January of 1987, Nor-Cal laid off its employees, and its superintendent transferred to North Bay. Thereafter, Nor-Cal went out of business. North Bay has

continued the business from the premises formerly occupied by Nor-Cal.

C. Proceedings Below

This action was brought in May of 1987. The complaint set forth four claims arising from respondents' alter ego scheme: the Union's Section 301 wage and dues claim for breach of the labor agreement, the Trust Funds' Section 301 and ERISA claims for the fringe benefit contributions owed for work performed on the North Bay side of respondents' enterprise, a tort claim for fraud and a claim for punitive damages. The complaint also asserted the personal liability of Mr. and Mrs. Pettit, both by piercing the corporate veils of Nor-Cal and North Bay and under federal common law as participating tortfeasors.

On the first of four defense motions for summary judgment, the district court dismissed Local 343's wage and dues claim, without prejudice, for pursuit under the grievance procedure of the labor agreement. After discovery and the denial of the fourth motion, the district court directed the Trust Funds to move for summary judgment.

The district court granted the motion for summary judgment. As the court of appeals described it:

> On the basis of "an undisputed record of fraud, deception and obstruction," the district court ruled on summary judgment that North Bay was the alter ego of Nor-Cal. Order Granting Summary Judgment at 10 (quoting Order of May 24, 1988). Consequently, the court held that appellants breached the collective bargaining agreement by failing to extend its terms and conditions of employment to North Bay employees. The district court awarded appellees $2.5 million in fringe benefit contributions, liquidated damages, interest, attorneys' fees and costs, and $2 million in punitive damages. Judgment was entered not only against Nor-Cal on the theory that North Bay was its alter ego, but also against the Pettits in

> their individual capacities on the theory that appellants were entitled to pierce the corporate veil.

App. A, *infra*, 2a.

The court of appeals below cited established Ninth Circuit precedent, including *Haley & Haley, supra*, and *A. Dariano & Sons, supra*, in stating the alter ego legal standard. However, the court omitted the "disguised continuance" language from those opinions' statements of the alter ego test. *Id.*, 48 F.3d at 1470, 1472. *Compare N.L.R.B. v. O'Neill*, 965 F.2d 1522, 1529 (9th Cir. 1992), *cert. denied* —— U.S. ——, 113 S.Ct. 2995, *Haley & Haley, supra*, 880 F.2d at 1149-1150. *A. Dariano & Sons, supra*, 869 F.2d at 518. Instead, it held that in order to establish alter ego status, petitioners had to show that North Bay was an attempt to avoid the collective bargaining obligations of Nor-Cal. App. A, *infra*, 5a, 9a. The court characterized this as the "intent" portion of the alter ego showing. App. A, *infra*, 9a, 12a-13a.

The court of appeals agreed with the district court that summary judgment was proper on the single employer portion of the alter ego test. App. A, *infra*, 7a-12a, reviewing App. B, *infra*, 23a-24a. The court of appeals also agreed that petitioners had

> presented significant evidence of Elmar Lee Pettit's anti-union animus and his intent to avoid the collective bargaining agreement with Local 343. Evidence was presented to show that on numerous occasions he declared "I'm gonna close that fucking Union shop!" (S.E.R. [Supplemental Excerpt of Record] Tab 42, at ¶ 6.) Further evidence was presented that he even told a customer that he had to take care to "conceal his involvement with North Bay so that he would not get caught at double breasting." (S.E.R. Tab 13 at ¶ 11.) The appellees also presented evidence that Elmar Lee Pettit used North Bay to do work that would have been performed by Nor-Cal if North Bay had not been created. In fact,

> their evidence showed that several Nor-Cal projects were transferred to North Bay abruptly, in the middle of the job. (*See* S.E.R. Tab 13, at ¶¶ 8-11; Tab 14, at ¶¶ 40-43; Tab 53, at ¶ 3.) Finally, the appellees presented evidence that Nor-Cal stopped bidding on jobs and shut down its operations in 1987. (*See* S.E.R. Tab 29, at ¶¶ 8-12).
>
> * * * *
>
> In sum, appellees have produced substantial evidence that North Bay and Nor-Cal constituted a single employer and that Elmar Lee Pettit's purpose in establishing North Bay was to effect a technical change in operations that would enable him to continue his plumbing business while avoiding his obligations under the collective bargaining agreement with the employees of Nor-Cal.

App. A, *infra*, 9a-10a.

Even though the above-described evidence was undisputed, the court of appeals held that *other* evidence created "a genuine issue of material fact regarding whether Pettit created and operated North Bay with the intention of avoiding Nor-Cal's collective bargaining obligations." App. A, *infra*, at 13a.[2] In reality, what the Ninth Circuit found was not a conflict in the evidence but a conflict as to the conclusion to be drawn from that evidence.

Nevertheless, on the basis of this finding, the court of appeals reversed the grant of summary judgment. The court denied a petition for rehearing and rejected a suggestion for rehearing en banc.

---

[2] Earlier, the court of appeals' own opinion had held Mr. Pettit's sworn testimony to be so internally inconsistent that it failed "to create a *genuine* issue of material fact as to whether North Bay was the alter ego of Nor-Cal." App. A, *infra*, 12a. (Italics in original.) Similarly, the district court had found that Mr. Pettit's denials were so self-contradictory that they could not establish a genuine issue of material fact. App. B, *infra*. 26a.

REASONS FOR GRANTING THE PETITION

The NLRB's rule is stated clearly in *Stardyne*: "The Board does not require, however, that an illegal motive be established in order to find alter ego status. [Citations omitted.]" *Johnstown Corp. and/or Stardyne, Inc.*, 313 N.L.R.B. 170, 171 (1993). The First, Second, Third, Fifth, Sixth, Ninth, Tenth and District of Columbia Circuits have agreed that intent is not essential to an alter ego finding, but its presence is a factor to be considered. *N.L.R.B. v. Hospital San Rafael*, 42 F.3d 45, 51 (1st Cir. 1994), *Goodman Piping Products v. N.L.R.B.*, 741 F2d 10, 12 (2d Cir. 1984), *Stardyne, Inc. v. N.L.R.B.*, 41 F.3d 141, 146-152 (3d Cir. 1994), *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 508 (5th Cir. 1982), *cert. denied* 464 U.S. 932 (1983), *N.L.R.B. v. Allcoast Transfer, Inc.*, 780 F.2d 576, 579-582 (6th Cir. 1986), *N.L.R.B. v. O'Neill*, 965 F.2d 1522, 1529 (9th Cir. 1992), *cert denied* —— U.S. ——, 113 S.Ct. 2995, *Haley & Haley, Inc. v. N.L.R.B.*, 880 F.2d 1147, 1150 (9th Cir. 1989), *N.L.R.B. v. Tricor Products, Inc.*, 636 F.2d 266, 270 (10th Cir. 1980), *Fugazy Continental Corp. v. N.L.R.B.*, 725 F.2d 1416, 1419 (D.C. Cir. 1984).

The Seventh and Eighth Circuits, now joined by the court below, hold that a showing of either anti-union animus or intent to avoid collective bargaining obligations is critical to an alter ego finding. *Trustees of Funds of IBEW Local 701 v. Favia Electric Co.*, 995 F.2d 785, 789 (7th Cir. 1993), *Iowa Express Distribution, Inc. v. N.L.R.B.*, 739 F.2d 1305, 1310-1311 (8th Cir. 1984), *cert. denied* 469 U.S. 1088 (1984).

The Fourth Circuit has devised its own standard, which requires a finding that the employer has expected or obtained an economic benefit from the transfer of business from the union signatory to its non-union alter ego. *Alkire v. N.L.R.B.*, 716 F.2d 1014, 1020-1021 (4th Cir. 1983).

Despite this deep division, few courts have examined the question closely. The two which have done so, the Third Circuit in *Stardyne, supra,* and the Sixth Circuit in *Allcoast Transfer, supra,* both have concluded that the NLRB's test is more consistent with the purposes and policies of the National Labor Relations Act. In *Stardyne, supra,* 41 F.3d at 148, the Third Circuit explained:

> We view the Board's resolution of this conflict as consistent with the Act. First, it can be argued that the Board's policy, which relies primarily on an examination of objective criteria, provides for easier and more consistent application of the Act than one in which intent is an essential element. It may be difficult to determine intent when there are facially legitimate business reasons that support a change in corporate form. *See Allcoast*, 780 F.2d at 582. Accordingly, the Board's objective test arguably serves to prevent "industrial strife and unrest," 29 U.S.C. § 151, by restricting the ability of employers to use a pretext in order to avoid their labor obligations. Second, the Board's policy can be defended on the ground that it provides a degree of protection for the legitimate expectations of workers who enter into a collective bargaining agreement with the understanding that it will continue to apply so long as they are working for what they regard as the "same" employer. It can also be argued that the Board's policy furnishes this protection while at the same time generally permitting changes in ownership of employers without saddling the successor with collective bargaining agreements to which they did not agree. *See Burns*, 406 U.S. at 281-82, 92 S.Ct. at 1579. In this way, the Board's rule can be said to promote the Act's goal of encouraging the use of collective bargaining arrangements as a way to balance economic bargaining power. See 29 U.S.C. § 151.

In *Allcoast Transfer, supra,* 780 F.2d at 582, the Sixth Circuit stated:

> Our rejection of the argument that the Board must find an intent to evade union obligations or anti-union animus before imposing alter ego status furthers the purpose of the alter ego doctrine. As we stated earlier, the doctrine was developed to prevent employers from evading obligations under the Act by merely changing or altering their corporate form. If we were to require a finding of employer intent, an employer who desired to avoid union obligations might be tempted to circumvent the doctrine by altering the corporation's structure based on some legitimate business reason, retaining essentially the same business, and utilizing the change to escape the unwanted obligations. Our flexible approach will discourage such attempts at circumvention by allowing the Board to weigh all the relevant factors instead of requiring it to always show the employer's intent to evade. Accordingly, even when purportedly legitimate reasons support an alteration in structure, the Board can prevent an employer from avoiding obligations under the Act.

These observations have special force in the instant case. Here, petitioners not only have proved Nor-Cal and North Bay to be a single employer, but also have introduced persuasive, undisputed, unimpeached evidence showing respondents' anti-union animus *and* their intent to avoid Nor-Cal's collective bargaining obligations. Nevertheless, the court of appeals' decision requires a trial of respondents' pretextual "alternative explanation" for the existence of North Bay.

Such a result conflicts not only with the policies and purposes of the Act, but also with the strong majority of the circuits and the Ninth Circuit's own prior holdings in *O'Neill, supra,* 965 F.2d at 1529 and *Haley & Haley, supra,* 880 F.2d at 1150. These conflicts plainly warrant resolution.

There is a special circumstance, however, which the Court may find to justify a delay in its resolution of the

circuit conflict presented by this petition and the one in *Hospital San Rafael*, No. 94-1802. Despite approving the NLRB's objective alter ego standard, the Third Circuit in *Stardyne, supra*, did not enforce the Board's order but remanded the case to the Board for further proceedings. The basis for the remand was that the Third Circuit perceived a conflict within the Board's cases on the issue of whether or not single employer status is a prerequisite to alter ego status. *Stardyne, supra*, 41 F.3d at 152-153.

The Board's resolution of *Stardyne*, and its explanation of the relationship between single employer and alter ego status, may prove essential to this Court's review of the criteria for determining alter ego status. Without the Board's clarification of how its objective criteria are to be used in determining alter ego status, it may be difficult to evaluate the subjective intent requirement. Accordingly, this Court's resolution of the circuit conflict should await the Board's decision in *Stardyne*. Indeed, the Board's decision may render this Court's intervention unnecessary.

Nevertheless, the decision below stands in conflict with the holdings of the NLRB, eight circuit courts of appeals, the Ninth Circuit's own prior decisions, and the sound reasoning of *Stardyne, supra*, and *Allcoast Transfer, supra*. To alleviate these conflicts while the Board considers *Stardyne*, the Court should grant this petition, summarily vacate the decision below, and remand the case for further proceedings. This will allow the Ninth Circuit to resolve its inter- and intra-circuit conflicts with the assistance of the Board's decision in *Stardyne*.

CONCLUSION

The circuits' division on the alter ego intent issue is one which should be resolved. However, that resolution should come after the NLRB has carried out its "primary responsibility for developing and applying national labor

policy." *N.L.R.B. v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-787 (1990).

Accordingly, petitioners respectfully submit that the court of appeals' decision below should be vacated summarily and this case should be remanded for appropriate further proceedings. Petitioners further submit that the petition in No. 94-1802 should be denied. However, should the petition in No. 94-1802 be granted, petitioners request that the instant petition also should be granted, or at least should be held pending disposition of that case.

Respectfully submitted,

JOHN J. DAVIS, JR.
Counsel of Record
MCCARTHY, JOHNSON & MILLER
595 Market Street, Suite 2200
San Francisco, CA 94105
(415) 882-2992
Attorneys for Petitioners

Dated: June 23, 1995